No. SC85683

IN THE MISSOURI SUPREME COURT

In the Interest of

K.A.W. and K.A.W.,

Minor Children

BRIEF OF RESPONDENT DIVISION OF FAMILY SERVICES

JEREMIAH W. (JAY) NIXON
Attorney General

GARY L. GARDNER
Assistant Attorney General
Post Office Box 899
Jefferson City, Missouri 65102
Telephone 573-751-3321
Facsimile 573-751-9456

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Session Laws:

Congressional Reports:

STATEMENT OF FACTS

The Division of Family Services adopts the statement of facts of the City of St. Louis Juvenile Officer.

ARGUMENT

I.

Though the question is not preserved for appellate review, termination of parental rights for children's being in foster care for at least 15 of the most recent 22 months before filing a termination petition has a rational relationship to the state's legitimate interest in promoting adoptions of children who have been removed from their parental homes for extended periods of time and are still awaiting parental maturity. (Responds to appellant's Argument I.A.1.)

A. Failure to preserve for appellate review

To preserve a constitutional issue for appellate review, a party must raise the issue at the earliest opportunity, usually in a responsive pleading. *See In re T.E.*, 35 S.W.3d 497, 504–505 (Mo. App. E.D. 2001) (constitutionality of reasonable efforts, termination upon consent of parent, and social summary statutes not raised until on appeal)*; In re R.H.S.*, 737 S.W.2d 227, 233–34 (Mo. App. W.D. 1987) (constitutionality of statutory ground for termination not raised until after judgment). In her answer to the petitions for termination, the mother denied that her children had been in foster care with the Division of Family Services for at least 15 of the most

recent 22 months before the filing of the termination petition. (L.F. 85, 88; A.S.L.F. 44.) But she did not raise any constitutional issue in her answer.

B. Termination for extended foster care is constitutional

Because parental rights must be balanced with the rights of children and of the state, the standard to be applied in determining the constitutionality of statutes affecting those rights must be determined on a case–by–case basis. *See Blakely v. Blakely*, 83 S.W.3d 537, 546 (Mo. banc 2002) (declining to review grandparent visitation statute under strict scrutiny), citing *Troxel v. Granville*, 530 U.S. 57, 73 (2000) (same); *see also Phelps v. Sybinski*, 736 N.E.2d 809, 817–18 (Ind. App. 5th Dist. 2000) (reviewing extended foster care statute). A Missouri statute is presumed constitutional unless the challenging party carries the burden of proving that the statute "clearly and undoubtedly" violates some constitution provision and "palpably affronts some fundamental law embodied in the constitution." *Blakely*, 83 S.W.3d at 540–41. Therefore, where feasible, the statute will be interpreted consistently with the constitution with all doubts resolved in favor of constitutionality. *See id.*

This court should apply the rational basis test to Missouri's extended foster care

statute. But even under strict scrutiny, Missouri's statute is constitutional.[1] Missouri has a compelling state interest in promoting adoptions of children suspended in foster care awaiting parental maturity. Moreover, Missouri's statute is narrowly drawn to make effective that interest because the statute merely provides a guideline for the time given to parents to rehabilitate themselves. Termination is not compelled, but remains permissive upon a showing that it is in the child's best interests.

Like the Indiana, Nebraska, and Oklahoma statutes discussed below, Missouri's statute merely permits the filing of a petition to terminate parental rights when there is particular evidence of unfitness — "the child has been in foster care for at least fifteen of the most recent twenty–two months." § 211.447.2(1), RSMo 2000. Filing a petition to terminate for extended foster care is not mandatory. The state has the discretion not to file a such petition when the child is being cared for by a relative, a compelling reason exists that filing such a petition would not be in the child's best interest, or the state has not provided the parents with reasonable efforts to make it

[1]This issue is under submission in *In re M.D.R.*, No. SC85208, and in *In re P.L.O. & S.K.O.*, No. SC85120.

possible for the child to return home. *See* §§ 211.447.3, 211.183.1, RSMo 2000; *In re J.J.P.*, 113 S.W.3d 197, 202 (Mo. App. S.D. 2003).

And even after such a petition is filed, termination is not mandatory. Missouri does not substitute the mere passage of time for a determination that parental rights should be terminated. Termination can only occur if a circuit court finds that extended foster care opens the door to termination *and* the court then "finds that the termination is in the best interest of the child." § 211.447.5. Missouri has a "two–step procedure for terminating parental rights." *In re K.C.M.*, 85 S.W.3d 682, 690 (Mo. App. W.D. 2002).

The mother argues that the juvenile officer delayed filing the termination petition so that the children would be in foster care 15 out of the most recent 22 months, counting the 12 months before and the 3 months after the trial court's May 24, 2002, dispositional order. The mother does not explain why she adopts this counting scheme.

The plain language of the statute indicates that the 15 and the 22 month periods are to be determined by counting backwards from the time the termination petition is filed. "A petition to terminate the parental rights of the child's parent or parents shall be filed ... when information available to the juvenile officer or the division establishes that the child has been in foster care for at least fifteen of the most recent twenty–two months." § 211.447.2(1). Counting in that manner, if the termination petition had

been filed on July 19, 2002, as the trial court first directed in its first permanency planning order (Appellant's App. A56), the children would have been in foster care exactly for the immediately preceding 15 months. The children entered foster care on April 18, 2001. (Appellant's App. A5.) In its second permanency planning order, the trial court extended the time to file the termination petition to September 6, 2002. (Appellant's App. 58.) This extension had no effect on whether the children were in foster care the required period of time.

The mother also argues that termination for extended foster care is not required by the Adoption and Safe Families Act of 1997, upon which Missouri's law is based. But the federal law does not prohibit the states from making extended foster care a ground for termination. *See* Pub. L. 105–89, § 103(a)(3)(E); 111 Stat. 2115, 2118; 42 U.S.C. § 675(5)(E).[2] And, like Missouri's law, the federal law is intended to promote adoptions of children languishing in foster care. Congress intended for termination petitions based upon extended foster care "to increase the number of

[2]States wishing to receive federal funding for foster care and adoption assistance must have a state plan that provides for a case review system that includes filing a termination petition when, with certain exceptions, a child has been in foster care for 15 of the most recent 22 months. *See* 42 U.S.C. § 671(a)(16); 42 U.S.C. § 675(5)(E).

adoptions" and "to produce a substantial increase in adoptions in the years ahead." H.R. Rep. 105–77, at 7 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2739, 2739–2740.

Finally, the mother also argues that termination for extended foster care bears no logical relationship to parental conduct. But Missouri can construe its statute, as Oklahoma has done, to require culpable parental responsibility for extended foster care. Such a construction would be in accord with a finding that the state has provided parents with reasonable efforts to make it possible for their children to return home. *See* §§ 211.183.1, 211.447.3(3).

C. Other states have found termination for extended foster care to be constitutional

The Indiana court of appeals has refused to apply strict scrutiny to Indiana's extended foster care statute because the statute does not significantly interfere with family integrity. The Indiana statute merely sets a "benchmark for additional involvement of the judicial process" — the parents of a child placed out of the home for the requisite period of time, "during which they have appeared at a number of hearings on the issue," must appear in court one more time for a determination of the best interests of the child. *Phelps*, 736 N.E.2d at 817–18.

Indiana's statute is constitutional because it "seeks to facilitate adoptions, instead of endless foster care placements," by setting a "fifteen–month benchmark," at

which a petition to terminate parental rights is filed. *Phelps*, 736 N.E.2d at 818; *see also James v. Pike County, Ind., Office of Family & Children*, 759 N.E.2d 1140, 1143 (Ind. App. 1st Dist. 2001).

> Although the filing of such a petition is certainly not a matter to be taken lightly, it does bear a rational relation to the State's very legitimate interest in promoting adoptions of children who have been removed from their parental homes for extended periods of time. The Indiana statute, with the protections outlined above, does not violate the Due Process Clause.

Phelps, 736 N.E.2d at 818. Among those protections is that after the petition is filed, a hearing must be held to determine whether termination is in the best interests of the chid. *Id*.

As the Indiana statute merely provides a "benchmark" for additional judicial involvement, Nebraska's extended foster care statute merely provides a "guideline" for the time required for parental rehabilitation. *In re Ty M.*, 655 N.W.2d 672, 692 (Neb. 2003). The statute does not violate due process because "adequate safeguards are provided to ensure that parental rights are not terminated based solely upon the length of time children are in out–of–home placement." *Id*. Among those safeguards is that if it is proven that the requisite period of time has expired, it must also be proven that

termination of parental rights is in the best interests of the child. *Id*. The state's interest promoted by extended foster care statutes has been eloquently stated by the Nebraska Supreme Court:

> Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. The concept of permanency is not simply a "buzzword," as [the parent] contends, but rather, a recognition that when there is no reasonable expectation that a natural parent will fulfill his or her responsibility to a child, the child should be given an opportunity to live with an adult who has demonstrated a willingness and ability to assume that responsibility *and* has a permanent legal obligation to do so.

In re Sunshine A., 602 N.W.2d 452, 460 (Neb. 1999).

The "plain purpose" of Oklahoma's extended foster care statute "is to protect children from extended foster care." *In re M.C.*, 993 P. 2d 137, 139 (Okla. Civ. App. Div. 2 1999) (statute improperly applied retroactively). But the statute "is not a strict liability statute" because the "defense" that termination is not in the child's best interests remains available to the parent; "termination is permissive, not mandatory." *In re T.M.*, 6 P.3d 1087, 1093 (Okla. Civ. App. Div. 1 2000) (statute not applied retroactively); *see In re M.J.*, 8 P.3d 936, 939 (Okla. Civ. App. Div. 3 2000) ("we see

nothing ... proscribing a parent's presentation of defensive matters otherwise available in proceedings under provisions other than the fifteen–of–twenty–two–month section"). Indeed, Oklahoma has construed its statute to require a showing of culpable parental responsibility for placement in foster care for the requisite period of time. *See In re C.R.T.*, 66 P.3d 1004, 1012 (Okla. Civ. App. Div. 2 2003) ("extended foster care per se does not create a stand alone basis for termination of parental rights").

The Illinois Supreme Court found an Illinois Adoption Act statute unconstitutional. But there, extended foster care was more than a trigger for initiating action or even a ground for termination. That statute created a presumption of parental unfitness based upon the child's being in foster for 15 months out of any 22 month period, rebuttable by the parent showing it is more likely than not it will be in the child's best interests to be returned to the parent within 6 months of the date the termination petition was filed. *See In re H.G.*, 757 N.E.2d 864, 871 (Ill. 2001); 750 ILCS 50/1(D)(m–1) (West 1999). The Indiana, Nebraska, and Oklahoma statutes have no similar provision, and, as shown above, neither does the Missouri statute. In fact, the statute the Illinois court struck down is not Illinois's counterpart to the Indiana, Nebraska, Oklahoma, and Missouri statutes, or for that matter the federal statute. Illinois's statute requiring filing of a termination petition for extended foster care is contained in the Illinois Juvenile Court Act and states that the children and family services department shall request the state's attorney to file a termination

petition if "a minor has been in foster care ... for 15 months of the most recent 22 months." 705 ILCS 405/2–13 (4.5)(a)(i) (West1999). The Illinois Supreme Court was aware of this Juvenile Court Act statute and distinguished it from the constitutionally infirm Adoption Act statute by saying the infirm statute "goes a step further." *H.G.*, 757 N.E.2d at 866.

For these reasons, termination of parental rights upon the ground of extended foster care is constitutional.

II.

Though the question is not preserved for appellate review, requiring prior judicial approval of transfer of children for the purpose of adoption has a rational relationship to the state's legitimate interest in prohibiting the indiscriminate transfer of children, and judicial approval is guided by limiting the persons who can invoke § 453.110, RSMo, requiring pre–adoptive investigations and guardians ad litem, and not placing the burden of proving children's best interests upon parents. (Responds to appellant's Argument I.A.2.)

A. Failure to preserve for appellate review

To preserve a constitutional issue for appellate review, a party must raise the issue at the earliest opportunity, usually in a responsive pleading. *See In re T.E.*, 35 S.W.3d 497, 504–505 (Mo. App. E.D. 2001) (constitutionality of reasonable efforts, termination upon consent of parent, and social summary statutes not raised until on appeal)*; In re R.H.S.*, 737 S.W.2d 227, 233–34 (Mo. App. W.D. 1987) (constitutionality of statutory ground for termination not raised until after judgment). The mother did not raise any constitutional issue in her answer to the termination petitions.

B. Section 453.110, RSMo, was not used to terminate parental rights

The mother's point asserts that the trial court indirectly used § 453.110, RSMo, to terminate her parental rights, but her argument does not develop her point. In any event, the trial court did not use the statute, even indirectly, to terminate parental rights. The grounds upon which the mother's parental rights were terminated are abuse and neglect, failure to rectify, parental unfitness, and extended foster care. (L.F.106–107; Appellant's App. A4–A5.)

The juvenile officer's invocation of the statute only started the process that ultimately led to termination of the mother's parental rights. After hearing stipulated evidence on the juvenile officer's petition, the trial court ordered, among other things, that the juvenile officer file a neglect petition under § 211.031, RSMo, which the juvenile officer did. (L.F. 38–39, 40–41.) Thereafter, an adjudicatory order, a dispostional order, permanency planning orders, termination petitions (also filed upon order of the juvenile court), and a judgment terminating the mother's parental rights followed. (Appellant's App. A10, A20, A51, A56, A57, A58, A1; L.F. 83; A.S.L.F. 42.)

C. Requiring prior judicial approval of transfer of children for the purpose of adoption is constitutional

The mother's point also asserts that § 453.110 is overbroad and places judicial discretion above a parent's right to chose. Citing *Troxel v. Granville*, 530 U.S. 57 (2000), she argues that the statute violates her substantive due process right to control of her children. She claims that before she can transfer her children for the purposes of adoption, the statute requires her to file a petition for court approval of such transfer and places court approval solely within the court's determination of the children's best interests without any deference to her wishes, as if she were an unfit parent.

Because parental rights must be balanced with the rights of children and of the state, the standard to be applied in determining the constitutionality of statutes affecting those rights must be determined on a case–by–case basis. *See Blakely*, 83 S.W.3d at 546, citing *Troxel*, 530 U.S. at 73. A statute is presumed constitutional unless the challenging party carries the burden of proving that the statute "clearly and undoubtedly" violates some constitution provision and "palpably affronts some fundamental law embodied in the constitution." *Blakely*, 83 S.W.3d at 540–41. Therefore, where feasible, the statute will be interpreted consistently with the constitution with all doubts resolved in favor of constitutionality. *See id*.

This court should apply the rational basis test to § 453.110. But even under strict scrutiny, the statute is constitutional. As even the mother recognizes, Missouri has a compelling state interest in "prohibit[ing] the indiscriminate transfer of children,"

as if they were chattel. *In re Baby Girl*, 850 S.W.2d 64, 68 (Mo. banc 1993). State regulation of adoption protects the interests of children and prevents a "black market trade" in children. *Id*. at 71. Therefore, requiring prior judicial approval of transfer of children for the purpose of adoption, *see* § 453.110.1, RSMo 2000, is a permissible limitation on the parental right to control children. "Parental rights, although of prime importance, must be balanced with other rights, such as the best interests of the child and the state's interest." *Blakely*, 83 S.W.3d at 546.

Moreover, the statute is narrowly drawn to make effective the state's interest because it "does not simply leave the best interests issue to the unfettered discretion of the trial judge." *Blakely*, 83 S.W.3d at 545. First, only an "interested" person, not just any person, can invoke the jurisdiction of the circuit courts. § 453.110.2; *Baby Girl*, 850 S.W.2d at 69. *See also Blakly*, 83 S.W.3d at 544 (third party visitation statute limited to grandparents). The juvenile officer qualifies as an interested person by reason of her duties to make such investigations and furnish the juvenile court with such information and assistance as it requires to carry out its purpose of caring for, protecting, and disciplining children. *See* §§ 211.041.1(1), 211.011, RSMo 2000. In this case, the juvenile officer filed petitions under § 453.110. (L.F. 14, 26.)

Second, the circuit courts' discretion is channeled and guided by the requirement that a pre–adoptive investigation and report be prepared and submitted to the court and by the services of a guardian ad litem for the children. *See* § 453.110.2;

§ 453.070, RSMo Cum. Supp. 2002; § 453.025, RSMo 2000. *See also Blakely*, 83 S.W.3d at 545 ("several procedural safeguards [including home study and guardian ad litem] assist the judge in making the best interests determination"). In this case, the trial court ordered the preparation and submission of a pre–adoptive report and had the services of a guardian ad litem. (L.F. 38–39, 40–41.)

Third, in this case, the mother did not have the burden of proving that her adoptive placements were in the best interests of her children; no presumption of unfitness was applied to her. *See Blakely*, 83 S.W.3d at 545 (decision of parents afforded "rebuttable presumption of validity"). The burden of proof that the mother's adoptive placements were not in the best interests of her children was on the juvenile officer who filed the petitions under the statute. The petitions alleged that the mother first placed the children with adoptive parents in California, then with adoptive parents in Arkansas, and finally with adoptive parents in the United Kingdom, all within the space of three months. (L.F. 15–16, 27–28.) The juvenile officer further alleged that the mother thereby caused the children to be subject to unstable and inappropriate temporary placements and that she was not able at this time to provide the children with the proper care for their well being. (L.F. 17, 29.) The juvenile officer requested that the trial court place the children in the protective custody of Family Services. (L.F. 17, 29.) The mother could have prevailed under the statute by the mere failure of the juvenile officer's proof.

Under *Troxel* and *Blakely*, circuit courts are required to consider "the parents' right to make decisions regarding their children's upbringing, determine the reasonableness of those decisions, and then balance the interests of the parents, child, and grandparents." *In re Barker*, 98 S.W.3d 532, 535 (Mo. banc 2003). The same paradigm applies to this case where, rather than the relatively weak interest in grandparent visitation, the interest of the state in prohibiting the indiscriminate transfer of children is at stake. Although parental decisions are given "material weight," that paradigm permits circuit courts to determine the reasonableness of parental decision making based on the evidence; the courts are not required to accept parental decisions "blindly." *Id*. at 535–536.

For these reasons, the mother's parental rights were properly terminated, and § 453.110 is constitutional.

CONCLUSION

For the reasons stated above, the judgment terminating the mother's parental rights should be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

GARY L. GARDNER
Assistant Attorney General
Missouri Bar No. 24779

Post Office Box 899
Jefferson City, Missouri 65102
Telephone (573) 751-3321
Facsimile (573) 751-9456

ATTORNEYS FOR RESPONDENT
DIVISION OF FAMILY SERVICES

CERTIFICATES OF SERVICE AND COMPLIANCE

I hereby certify that 1 copy and 1 computer diskette of the foregoing were served by FedEx priority overnight, billed to sender, this day of 31st day of December, 2003, upon:

Chris E. Rollins
Kayla Vaughn
Mark Kruger
4232 Forest Park Ave.
St. Louis, MO 63108

Donna Head
Susan Guerra
Karen A. Dill
920 N. Vandeventer
St. Louis, MO 63108

Bernhardt W. Klippel III
Suite 1100

Bryan Hettenbach
Suite 300

225 S. Meramec Ave.
Clayton, MO 63105

13321 North Outer Forty Rd.
Town & Country, MO 63017

Jeff Childress
Room 329
111 N. 7th St.
St. Louis, MO 63101

I hereby certify that this brief contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 3968 words and that the diskettes provided this Court and counsel have been scanned for viruses and are virus–free.

_____
Assistant Attorney General